

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 21.01.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NOS. 670, 702, 703, 713 & 750 OF 2009

V.Vijayakumar .. Appellant in CA 670/09
R.Jayakrishnan .. Appellant in CA 702/09
P.Arul .. Appellant in CA 703/09
S.Krishnamurthy .. Appellant in CA 713/09
Vipin Mehra .. Appellant in CA 750/09

- Vs -

Inspector of Police
CBI/ACB, Chennai ... Respondent in all the appeals

Criminal Appeals filed u/s 378 of the Code of Criminal Procedure, against the judgment dated 20.10.2009 passed by the learned Special Judge, Special Court for CBI Cases, IX Additional CBI Court, Chennai, in C.C. No.33/1999.

For Appellant : Mr. R.Shanmugasundaram, SC, for
Mr. L.Bhaskaran in Crl. A. No.703/09
Mr. S.Xavier Felix in Crl. A. No.750/09
Mr. K.Sukumaran in Crl. A. No.702/09
Mr. V.Krishnakumar, in Crl. A. No.670/09
Mr. P.N.Radhakrishnan in Crl. A. No.713/09

For Respondents : Mr. K.Srinivasan, Spl. PP (CBI Cases)

COMMON JUDGMENT

The appellants herein, who are A-4 to A-8, along with three other accused, who were arrayed as A-1 to A-3, were charged and tried before the learned Addl. Special Judge, Special Court for CBI Cases, Chennai, in C.C. No.33/1999 for various offences under the Indian Penal Code as well as under the Prevention of Corruption Act. The trial court, while held that the charges as against A-1 and A-2 not proved and acquitted them and the charge

against A-3 having abated, as A-3 died pending trial, however, found A-4 to A-8 guilty and, accordingly, convicted and sentenced them as under :-

Accused	Section	Sentence
A-4 to A-8	Section 120 (B) r/w 420 IPC Section 468 r/w 471 IPC Section 13 (2) r/w 13 (1) (d) of PC Act	Convicted and sentenced to undergo imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of four months.
A-4	Section 468 IPC (11 Counts)	Convicted and sentenced to undergo imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of four months (for each count).
A-4	420 IPC	Convicted and sentenced to undergo imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of four months.
A-5 to A-8	420 IPC	Convicted and sentenced to undergo imprisonment for a period of two years and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of four months.

The sentences were directed to run concurrently and set off, as provided for u/s 428 Cr.P.C. was also ordered. Aggrieved by the said conviction and sentence, the present appeals have been preferred by the appellants herein, who were A-4 to A-8 in the said trial, questioning the sustainability of the said conviction and sentence. For the sake of convenience, the appellants as well as the acquitted accused will be referred to as A-1 to A-8 as they were arrayed before the trial court.

2. The case of the prosecution, shorn of unnecessary details, could be stated as under :-

A-1 to A-3 were employees of customs department; A-7 and A-8 the General Manager and Export Manager of the firm Valentine Garments and A-6 is the shareholder and partner of the firm Plus

Point Creations; A-4 was an employee under A-5, who was a Custom House Agent.

3. Every year, the exporters are provided with an export quota by the Apparel Export Promotion council (for short 'AEPC'), which would have to be exhausted by the end August of every year and insofar as the unused quota is concerned, the exporters have to get it revalidated by furnishing bank guarantee and the quota has to be exhausted by 31st December of the said year, failing which the bank guarantee provided by the exporters would stand forfeited.

4. It is the case of the prosecution that the firms, viz., Valentine Garments, Intercraft Exports and Old Village Industries, which come under a common administration entity, revalidated their quota by giving necessary bank guarantees. Since the said firms were not able to exhaust their quota by 31.12.95, they solicited the help of KSR Freight Forwarders in obtaining shipping bills endorsed by the Cargo Section of Customs so as to show that the products were exported, but in reality the cargo was not brought to the Air Customs, but with the aid of A-5 and A-4 and with the connivance of A-1 to A-3, fraudulently prepared the shipping bills, endorsed by A-3 and further A-1 and A-2 endorsed the said shipping bills clearing them for export without actually and physically verifying the goods, but stamped the documents as if the cargo had been verified on 31.12.95.

5. On 11.1.96, when P.W.1, then working as Preventive Officer, along with Bakthar, Superintendent of Customs (since deceased) along with one Jayakumar were conducting a routine duty, at about 3.00 p.m. on the said day, Bakthar noticed A-4 moving in a suspicious manner in the unaccompanied baggage hall and he was intercepted and on enquiry, shipping documents, numbering twelve, were recovered from him. Exs.P-1 to P-61 pertain to Invoices, Advance Terminal Storage Receipts, Airway Bills given by Cargolux, Shipping Bills for export and Exchange Control Declaration Forms. When A-4 was questioned regarding the cargo, A-4 could not identify the same. Though the shipping documents had the requisite endorsements, it was informed by A-4 that based on the instructions of his employer, the cargo was not brought to the cargo complex. Since the act of A-4 raised doubts, the documents, which were in triplicate, were seized.

6. The matter was entrusted with CBI, whereinafter, case was registered in RC No.6(A)/97 by one K.A.A. Salam, Inspector of Police, CBI/ACB and, thereafter, the case was taken up for investigation by P.W.29. P.W.29, on taking up investigation, examined witnesses and recorded their statements. In the course of investigation, P.W.29 collected the material documents from

Canara Bank relating to the bank guarantee given by them in favour of AEPC and also the other records pertaining to the bank guarantee, which is marked as Ex.P-151. After completion of investigation, final report was filed against all the accused on 14.12.99.

7. The accused were furnished with the relied upon documents u/s 207 Cr.P.C. and the trial court framed charges under the provisions of the Indian Penal Code as well as under the provisions of the Prevention of Corruption Act. When questioned, the accused pleaded not guilty.

8. To prove the case, the prosecution examined P.W.s 1 to 29, marked Exs.P-1 to P-153. When the accused/appellants were questioned u/s 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same as false. Neither any oral nor any documentary evidence was marked on the side of the defence. The trial court, after hearing either side and after considering the materials, both oral and documentary, available on record, while convicted the appellants/A-4 to A-8, as above, however, acquitted A-1 and A-2. Aggrieved by the said conviction and sentence recorded by the trial court, the appellants/A-4 to A-8 have filed the respective appeals.

9. Mr. Shanmugasundaram, learned senior counsel appearing for the appellant in CrI. A. No.703/09, at the outset submitted that the seizure spoken to by P.W.1 has not been effected in a manner known to law. It is the submission of the learned senior counsel that once alleged incriminating documents are seized, it is the duty of the officer, seizing such documents, to prepare observation mahazar and the documents are required to be sent to the jurisdictional Court. However, such a procedure has not been followed for reasons best known to the prosecution, which definitely creates a doubt as to the veracity of the version projected by the prosecution.

10. It is the further submission of the learned senior counsel that according to P.W.1, shipping bills in triplicate were seized from A-4. It is submitted that the seized shipping bills are only the carbon copies of the shipping bills, which were alleged to have been seized. It is the submission of the learned senior counsel that though the shipping bills were made ready on 31.12.95, however, due to certain operational difficulties, the export could not be carried out. Once the export is not carried out by 31.12.95, the last date for the export failing which the bank guarantee would stand forfeited, the accused did not proceed with the export formalities. However, the carbon copies of the shipping bills, in triplicate, were seized from A-4 and the case has been foisted upon the accused on the premise that a conspiracy was hatched between the

accused to get the bank guarantee from AEPC and, thereafter to claim duty draw back. It is the submission of the learned senior counsel for A-4 that the shipping bills were seized from A-4 on 11.1.96, by which time, the cut-off period of 31.12.95 has lapsed and, therefore, it would not be of any benefit to the accused as the cargo should have been exported by 31.12.95 for them to get the bank guarantee back and, thereafter, to claim the duty draw back.

11. It is the further submission of the learned senior counsel for A-4 that the original of the shipping bills have not been produced before the court by the prosecution. Had the intention of the accused been as alleged by the prosecution to claim the bank guarantee from AEPC, definitely, the original of the shipping bill would have been submitted at some point for completion of the necessary formality, so as to enable them to get return of the bank guarantee. The production of the original shipping bill is a necessity to sustain their case and non-production of the original shipping bill enures to the benefit of the accused. In the absence of the original shipping bill, the contention of the prosecution that the act of the accused was only with a view to get return of the bank guarantee and also to claim duty draw back pales into insignificance.

12. It is the further submission of the learned senior counsel that pursuant to the alleged seizure of the shipping bills, enquiry was initiated against the customs officials and custom house agent and the enquiry was alleged to have been conducted by P.W.23. However, P.W.23, has categorically deposed that he has not signed the report, Ex.P-140 and, therefore, the said report cannot be construed as a material evidence to implicate the accused, more so, when the statements said to have been recorded from the accused cannot be treated to be statements recorded u/s 162 Cr.P.C.

13. It is the further submission of the learned senior counsel that P.W.23, in his evidence has categorically deposed that the statements of the accused were not recorded by him and the persons, who had recorded the said statements have not been examined to prove the said documents. Further, P.W.23 has admitted that his report is purely on the basis of documents, which were already in existence and no further probe was made by him and he had merely relied on the said documents. In the wake of the fact that the report, Ex.P-140 submitted by P.W.23 having not been signed by him coupled with the fact that the statements on which reliance has been placed in the report not having been recorded by P.W.23, it is vehemently contended that placing reliance on the said statements as also the report by the trial court is nothing but putting the cart before the horse without following the due principles of law in the matter of

appreciation of evidence and, this aspect vitiates the prosecution case.

14. Learned senior counsel further submitted that though certain shipping bills were alleged to have been recovered from one Krishnamurthy, who is said to have been using the name of the CHA Abdul Azeez and doing business in their name, as is alleged in Ex.P-129, however, Ex.P-134, the order of the Commissioner of Customs reveal that though certain irregularities were committed by the CHA agent, but for a reason, as is disclosed in Ex.P-134. Therefore, the Commissioner of Customs, held that though irregularities were committed, but the same was not used to obtain any sinister advantage and, therefore, held that the act of the CHA agent is not in good faith and, therefore, suspended the license along with penalty. In this background, it is the contention of the learned senior counsel that mere betrayal of trust without gaining any advantage in the form of duty draw back or getting return of the bank guarantee cannot be a ground to impute allegation on the accused that the said documents were fabricated for the purpose of cheating AEPC.

15. It is the further submission of the learned senior counsel that the goods were not brought to the Air Cargo complex for clearance due to certain administrative lapses on the side of the accused and, therefore, the procedural formalities, which were completed prior to the bringing in of the goods for getting official clearance for its export cannot be put to the detriment of the accused to allege that the procedural formalities complied with by the accused was only for the purpose of raising a spurious claim to get return of the bank guarantee and, thereafter, to claim duty draw back. In this regard, learned senior counsel placed stress on the deposition of P.W.28, the staff of the Cargolex Airlines, who has deposed that since no goods was exported, no certificate was given for the purpose of claiming duty draw back.

16. Learned senior counsel also submitted that the deposition of P.W.22, the Assistant Commissioner of Customs, clearly reveal that only after the effecting of the shipment, duty draw back claims could be raised and paid. In this case, as no shipment was effected, the claim relating to duty draw back was not processed and claimed and, therefore, mere imputation of allegation that the shipping bills were processed only for the purpose of getting return of the bank guarantee and for claiming duty draw back at a later point of time is imaginary and without there being any sufficient material on record, more particularly, the original of the shipping bill, the case of the prosecution is only an illusion and has not been substantiated in a manner known to law.

17. Learned senior counsel also highlighted that mere filing/submission of shipping documents is not proof of completion of export, as could be evidenced from the deposition of P.W.20. It is the submission of the learned senior counsel that it is the case of the accused that only procedural formalities relating to export were complied with, but the export could not be carried out as the commodities for export could not be made ready and, therefore, the entire shipping activity was dropped. But A-4 was apprehended with the shipping bills, which were mere compliance of procedural formalities preceding the production of goods at the Air Cargo Complex for the purpose of export. Mere holding of shipping bills without there being any actual act by the accused to claim any pecuniary advantage or cause loss to the exchequer cannot be a ground to impute allegations against the accused.

18. Learned senior counsel, in support of his submission placed stress on the deposition of P.W.s 4, 5, 6, 7, 23 and 24, who are the witnesses to speak about the procedural formalities to be followed in the shipment of cargo and submitted that certain procedural formalities have to be completed, as could be evidenced from the deposition of the above witnesses prior to the actual export of the cargo and, therefore, the act of the accused cannot be stated to be an act, which has been done for the purpose of gaining a pecuniary advantage. Learned senior counsel, in this regard, placed more reliance on the deposition of P.W.14 in cross examination, wherein P.W.14 has categorically stated that under the above terminal challans, the consignment have not reached the airport and have not been admitted by the authorities as the column showing shipment admitted and ready for carriage condition is blank. It is therefore submitted that the above clearly shows that only the procedural formality prior to admitting the cargo for export alone was completed and no defrauding has been played on the exchequer by getting the cargo cleared by affixment of necessary seal for clearance and, thereafter, not exporting the said cargo, but undergoing the process only for the purpose of claiming the return of bank guarantee and claiming duty draw back. Therefore, in the absence of the prosecution placing necessary material to show that all the procedural formalities have been completed till physical receipt of the cargo and admittance of the cargo for the purpose of export, but in actuality not exporting the cargo, clearly shows that there was no ill-intent on the part of the accused to claim any undue advantage.

19. It is brought to the notice of this Court by the learned senior counsel that though AEPC forfeited the bank guarantee submitted by the accused, however, on appeal, the appellate authority has granted stay on the said order. It is the further submission of the learned senior counsel that A-1 to

A-3 having been acquitted by the trial court and there being no appeal as against their acquittal, the theory of conspiracy projected by the prosecution falls flat to the ground and as per the consistent view of the courts, once the charge u/s 120 (B) is held to be not proved, the meeting of minds, which is a necessary ingredient to substantiate the other charges also falls to the ground. The failure to file appeal against the acquittal of A-1 to A-3 against whom as well a charge u/s 120 (B) IPC was laid, coupled with the fact that the charge u/s 120 (B) IPC has been held proved as against these appellants, clearly portrays utter non-application of mind on the part of the trial court in respect of these appellants, and, therefore, the conviction and sentence recorded by the trial court deserves interference and the appellants are entitled to be acquitted of the charges framed against them.

20. It is the further submission of the learned senior counsel that though P.W.s 7 and 24 have issued the terminal challans for the shipment of the cargo, which is a necessity for taking in the cargo inside the complex, however, curiously, they have not been arrayed as accused. Further, P.W.s 4 and 5, who are also appraisers with the Customs Department, and who had also alleged to have culpability in the offence, have not been arrayed as accused and, in fact, the trial court, has come down heavily on the prosecution for not indicting P.W.s 4 and 5 as accused. This clearly shows that the prosecution is launched, for a version projected by the prosecution and not in the true sense of the prosecution for an offence under the Prevention of Corruption Act.

21. In fine, it is the submission of the learned senior counsel that the materials available on record, in no way, conclusively prove that the act of the accused was for the purpose of getting the return of bank guarantee and to claim duty draw back thereafter, but without actually exporting the commodity and the evidence falls much short of the mandatory requirement necessary for putting the thrust on the accused to rebut the presumption as envisaged under the Prevention of Corruption Act and, therefore, the prosecution having failed to prove their case beyond reasonable doubt, necessarily, the benefit of doubt has to enure in favour of the accused and, they are entitled for an acquittal by setting aside the judgment of conviction and sentence passed by the trial court.

22. Learned counsel appearing for the respective appellants, in toto adopted the arguments advanced by the learned senior counsel and with equal vehemence submitted that the trial court, without adverting to the materials available on record, has misdirected itself and recorded the conviction and sentenced the appellants, which reveals clear non-application of

mind on the part of the court below and, therefore, the impugned order deserves interference.

23. Learned counsel appearing for A-6 submitted that though A-6 was implicated in the abovesaid offence, however, he is not a partner and no documents to show that he was a partner in the firm of A-7 and A-8 has been produced by the prosecution. It is further submitted that the document, Ex.P-124, which was placed to show the details of the partners of the firm does not reflect the name of A-6. Further, it is the deposition of P.W.s 17 and 18 that A-6 is not a partner of their firm. Such being the case, the conspiracy theory projected by the prosecution that A-6 in connivance with A-4, A-5 and the other accused, conspired to gain pecuniary advantage having not been proved, the finding recorded by the trial court for convicting A-6 is wholly unsustainable.

24. Learned counsel appearing for A-7 and A-8 submitted that admittedly the shipping bills, which were recovered from A-4, have not been signed either by A-7 or A-8 and in such a backdrop, the case of the prosecution that A-7 and A-8 conspired with the other accused to gain pecuniary advantage is not proved on the basis of any documentary evidence. Without there being cogent and convincing evidence put forth by the prosecution to implicate A-7 and A-8, the statements, alleged to have been given by them cannot form the basis for their conviction, as they are not admissible under the Evidence Act.

25. Per contra, Mr.Srinivasan, learned Special Public Prosecutor, inter alia contended that the accused were apprehended before they could lay their claim for return of bank guarantee, on the basis of the documents, which were admittedly seized by the then Superintendent of Customs, Bakhtar. It is the further submission of the learned Special Public Prosecutor that had the intention of the accused not been to claim return of the bank guarantee, knowing fully well that export beyond 31.12.95 would be of no use to the accused, no reason whatsoever has been projected by the accused for the reason that the shipping bills were in possession of A-4 along with the necessary seal showing the date of export as 31.12.95. The fact that the shipping bills, in triplicate, was with A-4 and the beneficiary of the said transaction being A-6 to A-8, the connivance of the accused is explicitly evident in their acts as they were in custody of the shipping bills with the seal showing export on 31.12.95.

26. It is contended by the learned Special Public Prosecutor that the act of the accused stands proved by their own statements given to P.W.23, during the enquiry proceedings, in which all the accused have accepted their culpability in the

offence. P.W.23 has submitted a comprehensive report holding the guilt of the accused in his investigation which is evident from the enquiry report, Ex.P-140, which contains the enclosures of the statements of all the accused, viz., Exs.P-130, P-131, P-133 and P-134. The statements of the accused, which are self serving declarations, partake the character of extra judicial confession and the same being obtained without any force, coercion or otherwise, and is wholly corroborated by P.W.23, would be suffice to hold that the accused have committed the crime. Reliance was placed on the decision of the Hon'ble Apex Court in Ram Lal - Vs - State of Himachal Pradesh (2018 SCC OnLine 1730). The above materials have been appreciated by the trial court in proper perspective, which has led to the finding of guilt on the part of the accused and, therefore, no interference is called for with the said order passed by the trial court.

27. Mr. Shanmugasundaram, learned senior counsel, in reply to the submissions of the learned Special Public Prosecutor, vehemently submitted that the statements, alleged to have been recorded, would not partake the character of extra judicial confession, as the persons, who had recorded the said statements have not been examined, but for P.W.23, who was the enquiry officer, who has not examined those persons and recorded their statements. It is the submission of the learned senior counsel that time and again, this Court as well as the Hon'ble Apex Court have held that extra judicial confession, by itself is a very weak piece of evidence and without there being necessary corroboration, reliance cannot be placed on the said statements to convict the accused. In the case on hand, the persons, who have recorded the said statements having not been examined, there being no corroboration as to the veracity of the said statements, placing reliance on the same to confirm the conviction would be wholly unsustainable. It is the submission of the learned senior counsel that the statements have been recorded from the accused for the purpose of penalty proceedings, which is per se inadmissible under the Evidence Act. Acceptability of the said statements may be there under the Customs Act, but definitely it is an unacceptable piece of evidence under the Indian Penal Code.

28. It is the further submission of the learned senior counsel no questions touching upon the said aspect have been put to the accused u/s 313 Cr.P.C. and, therefore, placing reliance on the same by the prosecution is wholly unacceptable.

29. This Court paid its undivided attention to the submissions advanced by the learned counsel appearing on either side and also perused the materials available on record to which this Court's attention was particularly drawn.

30. The question that arises for consideration in these appeals are :-

"i) Whether the prosecution has proved that the endorsements in the shipping bills were clandestinely obtained for the purpose of claiming return of bank guarantee without there being actual export of the goods.

ii) Whether the extra judicial confession relied on by the prosecution could form the basis for conviction of the accused in the absence of examination of their authors."

31. It is not in dispute that as on date, neither any documents have been placed before the AEPC by the accused claiming return of bank guarantee or claiming duty draw back. Equally it is not in dispute that as against the forfeiture of bank guarantees by AEPC, appeal has been filed by A-7 and A-8 in which the appellate authority has granted stay.

32. Admittedly, one Bakthar (since deceased), the then Superintendent of Customs, had intercepted A-4 and had seized the shipping bills, though no observation mahazar was drawn for the said seizure. The said seizure is alleged to have been made in the presence of P.W.1. P.W.1, in his evidence has categorically deposed that though the shipping bills were seized from A-4, the shipping bills were not endorsed either by the said Bakthar or Jayakumar, who were present when the said shipping bills were seized. P.W.1 has also spoken to the fact that the cargo had not been brought to the Customs as spoken to by A-4.

33. P.W.29 is the investigation officer, who in his evidence has deposed that he did not take any steps to seize the documents from A-4, which were seized by Bakthar. In essence, it is clear that the documents, which form the basis of the case of the prosecution, has not been seized in a manner known to law.

34. P.W.s 3, 4 5, 6 and 7 are employees of Customs and Airports Authority of India, who speak about the procedural formality that is followed in the case of export of commodities. The various formalities that needs to be completed from the time the shipping bills are sealed to the point till the cargo is brought in and, thereafter, the same being screened by the Customs Department to its being taken to the shipping area for storage and, thereafter, for its onward transmission through air. It is clear from the evidence of all the above that the cargo did not reach the cargo complex for it to be examined and cleared for export.

35. P.W.16 is the freight forwarders, who in his evidence

has categorically deposed that the cargo, which was to be exported did not arrive at the scheduled time and the same was informed to him by one Krishnamurthy and subsequent to the said information, the booking with the airways for export was cancelled.

36. P.W.24 in his evidence has deposed that he is the custodian of the cargo once the cargo enters the complex till its onward transmission and that it is his duty to collect the necessary processing charges. P.W.24 has further deposed in cross examination that he does not remember signing only three challans. P.W.24 has further deposed that he was initially arrayed as 6th accused. However, he was not shown as one of the accused when the charge sheet was laid.

37. P.W.26 was the authority who accorded sanction for the prosecution of A-1. It is evident from his deposition in cross examination that prior to grant of sanction, adjudication was held under the Customs Act. It is borne out by records that the adjudication against the exporters, viz., A-7 and A-8 were dropped by the Customs Department u/s 113 (d) and 113 (k), wherein it is stated that no offence to commit any offence u/s 113 (d) of the Customs Act has been made out. From the above evidence, which is available on record, it is manifestly clear that the Customs Department has cleared the exporters from the adjudication proceedings holding that there was no attempt to export anything illegally.

38. It is not to be lost sight of by this Court that the terminal challans, which are the final leg in the clearance of the goods to be exported are signed by P.W.s 7 and 24. However, curiously, P.W.s 7 and 24 have not been arrayed as accused in this case. More so, the trial court has come down heavily on the prosecution for not arraying P.W.s 7 and 24 as accused in this case.

39. On top of all the above evidence, comes the crucial evidence of P.W.23, the enquiry officer, on whose evidence and report, Ex.P-140, much stress is laid by the prosecution to sustain the conviction rendered by the trial court, while the accused, in turn lay stress on the very same evidence and exhibit for toppling the prosecution case.

40. P.W.23, while deposed in detail about the process followed in bringing the goods into the air cargo complex and its movement within the complex, has categorically, even in chief examination, has spoken that he has not examined any person from the Airport Authority of India relating to preparation of terminal challan and the movement of the goods within the complex.

41. P.W.23, no doubt is the enquiry officer, who conducted the enquiry into the alleged transaction. P.W.23, in cross examination has categorically deposed that though Ex.P-140 is the report submitted by him, however, he has not signed in the said report. It is the further deposition of P.W.23 that Ex.P-139 contains the statements of the accused and others. However, P.W.23 has categorically deposed that the said statements were not recorded by him.

42. In this backdrop, while it is the contention of the prosecution that the above statements found annexed in Ex.P-139 partake the character of extra judicial confession and reliance can be placed on the same to convict the accused, however, it is stoutly opposed by the accused/appellants contending that extra-judicial confession needs to be corroborated and the person to whom the said extra judicial confession is alleged to be given has to be examined to corroborate the same and in the absence of examining the said persons, who recorded the statements, no reliance can be placed on the said statements and the same will not partake the character of extra judicial confession and the same is inadmissible as evidence under the Evidence Act.

43. Learned Special Public Prosecutor placed reliance on the decision of the Hon'ble Apex Court in Ram Lal's case (supra), wherein the Hon'ble Apex Court, has held thus :-

"13. Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. Considering the admissibility and evidentiary value of extra-judicial confession, after referring to various judgments, in Sahadevan v. State of Tamil Nadu, (2012) 6 SCC 403, this court held as under:-

"15.1. In Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259 this Court stated the principle that:

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

15.4. While explaining the dimensions of

the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in *State of Rajasthan v. Raja Ram* (2003) 8 SCC 180 stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made."

The Court further expressed the view that:

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused...."

15.6. Accepting the admissibility of the extra-judicial confession, the Court in *Sansar Chand v. State of Rajasthan*, (2010) 10 SCC 604 held that:

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide *Thimma and Thimma Raju v. State of Mysore*, (1970) 2 SCC 105, *Mulk Raj v. State of U.P.*, AIR 1959 SC 902, *Sivakumar v. State By Inspector of Police*, (2006) 1 SCC 714 (SCC paras 40 and 41 : AIR paras 41 and 42), *Shiva Karam Payaswami Tewari v. State of Maharashtra*, (2009) 11 SCC 262 and *Mohd. Azad alias Shamin v. State of W.B.*, (2008) 15 SCC 449]"

14. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In *Madan Gopal Kakkad v. Naval Dubey*, (1992) 3 SCC 204, this court after referring to *Piara Singh v. State of Punjab*, (1977) 4 SCC 452 held that the law does

not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated."

(Emphasis supplied)

44. Time and again, it has been held that extra-judicial confession is a weak piece of evidence and for the same to be relied upon as an evidence, the same must inspire the confidence of the court. It has also been the uniform ratio laid down by the Courts that extra-judicial confession must be corroborated by other prosecution evidence. Equally, the Hon'ble Supreme Court has held that conviction can be based on voluntary confession, but that rule of prudence requires that wherever possible, it should be corroborated by independent evidence.

45. Keeping the above principles, which has been time tested, in mind, this Court, on an analysis of the statements of the accused, on which stress is laid by the prosecution to treat the same as voluntary confession to find the accused guilty, is driven to the only inescapable conclusion that the said confession cannot form the basis of conviction for the reasons, which stare on the face of the record.

46. The pivot on which the prosecution rests is the enquiry report, Ex.P-140 given by P.W.23. According to the prosecution, the said report is not only exhaustive, but has considered various aspect of the matter and has ultimately found the accused guilty of the commission of the offence. However, the first score on which the report fails is that the same has not been signed, which has been admitted by P.W.23, who is alleged to have conducted the enquiry and prepared the report. Therefore, in the absence of P.W.23 signing the said report, Ex.P-140, no reliance can be placed on the said document to give a finding as to the culpability of the accused.

47. Secondly, the annexures, Ex.P-139, which form part of Ex.P-140 are said to be statements of the accused. It is the case of the prosecution that the same have been given by the accused voluntarily and free of coercion and, therefore, they partake the character of extra-judicial confession. However, P.W.23 has categorically deposed that he has not recorded the statements. In effect, the said statements have been recorded by persons other than P.W.23. It is not a single statement, but statements of very many accused and they have been recorded by different persons. However, none of the persons have been examined as witnesses. The said persons are said to be employees/officers of the Customs Department. This Court is at

a loss to understand as to what prevented the prosecution from examining those persons, who had recorded the said statements. Though it has been held by the Hon'ble Apex Court that conviction can be based on voluntary confession, however, rule of prudence requires that wherever possible it should be corroborated by independent witnesses. It is nobody's case that there are no independent witnesses. The persons of the Customs Department, who had recorded the said statements are the best persons to speak about the statements and also the mind of the persons, who had given those statements. Curiously, for reasons best known to the prosecution, the persons who recorded the said statements have not been examined. Though it has been held consistently by the Courts that it is not necessary that each and every circumstance should be corroborated, which is even the essence in Ram Lal's case (supra), however, in the present case, the statements stand totally uncorroborated. When the very statements are put in issue by the accused on the ground that it was not free and voluntary, the prosecution is duty bound to examine independent witnesses to corroborate the said statements. Absence of necessary corroboration hits at the very substratum of the prosecution case. The whole of the prosecution case rests on the statements of the accused, Ex.P-139 and the report, Ex.P-140, of the enquiry officer, P.W.23. The enquiry report not having been signed by P.W.23 and the statements of the witnesses not having been corroborated, the contention of the learned counsel for the accused that the confession of the accused cannot form the basis of the conviction deserves acceptance.

48. Once the extra judicial confession of the accused pales into insignificance, mere possession of shipping bills by A-4, that too with the signature of the exporters, viz., A-7 and A-8, would in no way further the prosecution case, as even according to the prosecution witnesses, the goods did not reach the cargo premises and only on the goods being allowed to enter into the cargo complex with the requisite gate pass and cleared by the ramp officer, it would be taken for the purpose of handing over to the same to the airlines for its forward exportation. The evidence of P.W.16 is amply clear that the cargo did not come into the cargo complex and, therefore, the airway bill was cancelled and, therefore, mere possession of shipping bills at the hands of A-4 with the initial procedural formality having been completed cannot in any way be said to be a circumstance leading to the only inference that the said formalities were completed only for the purpose of defrauding AEPC to claim the bank guarantees and, thereafter, to avail duty draw back. The prosecution is duty bound to prove by cogent and convincing materials the act of the accused in the commission of the offence and mere surmises and conjectures cannot stand as proof of an illegal act, alleged to have been committed by the

accused.

49. In this backdrop, one other aspect, which weighs more in the mind of this Court is the indictment recorded by the trial court for non-arraying of P.W.s 4 and 5 as accused. P.W.s 4 and 5 are said to be similarly placed as that of A-1 to A-3 and they are also signatories in certain shipping bills. However, they have not been arrayed as accused and the prosecution has not given any cogent and convincing reason to rebut the defence that it is a case of pick and choose and not on materials. Though non-implication of some person cannot be a ground, which would enure to the benefit of the appellants, however, the glaring deficiencies in the prosecution case, as narrated above, coupled with non-arraying of P.W.s 4 and 5 as accused, definitely goes to shake the prosecution theory.

50. Further, as is evident from the evidence of P.W.26 in cross examination, the proceedings u/s 113 (d) and 113 (k) of the Customs Act having been dropped against A-7 and A-8, who are the alleged exporters, and finding has been recorded in the adjudication that there is no attempt for any offence u/s 113 (d) definitely comes to the aid of the accused to accept their defence that the steps taken by them to go through with the export on 31.12.95 having not fructified, they had dropped the said transaction and the shipping bills, without the signature of the exporters, found in possession of A-4 were merely the residue of what was left of the unsuccessful transaction, more so, the original of the quadruplicate having not been placed by the prosecution in evidence, clearly enures to the benefit of the accused. Further, it is also to be remembered that the shipping bills did not have the signature of A-7 and A-8, the alleged exporters of the goods and taking the export to its logical end without the signature of the exporters would in no way be a possibility. There is no explanation from the prosecution on this aspect as well.

51. Insofar as A-6 is concerned, it is to be pointed out that no material whatsoever has been placed on record connecting A-6 to be a partner with the firm. Even the evidence of P.W.s 17 and 18 clearly show that A-6 is not at all a partner of the firm and no materials whatsoever has been placed in this regard. However, the trial court has erroneously convicted A-6 which is not borne out by the materials available on record.

52. The prosecution has rested its theory on Section 120 (B) IPC and had framed a charge against the appellants and the acquitted accused on the allegation that in pursuance of a conspiracy, they have colluded and acted in a manner prejudicial to the interest of the exchequer for the purpose of getting a

pecuniary gain by defrauding AEPC.

53. Conspiracy consists of an agreement or a combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or a criminal act or to do a lawful act by unlawful means. The agreement may be express or implied, or in part express and in part implied. Therefore, for an offence to fall under this section, bare engagement and association to break the law is the requirement and the methods employed should be illegal. However, the onus is on the prosecution to prove the charge of conspiracy by cogent evidence, direct or circumstantial.

54. The Hon'ble Supreme Court in V.C. Shukla - Vs - State (Delhi Admn.) (1980 (2) SCC 665 : 1980 SCC (Cri) 561), held as under :-

"8. Before we proceed further, we might indicate that it is well settled that in order to prove a criminal conspiracy which is punishable under Section 120-B of the Penal Code, 1860, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

(Emphasis Supplied)

55. From the ratio laid down above, it is emphatically clear that to bring home a charge u/s 120 (B) IPC, it is necessary for the prosecution to show, either through direct or circumstantial evidence that there was an agreement between two or more persons to commit an offence. It is the case of the prosecution that A-1 to A-3 conspired with A-4 to A-8 to reap pecuniary gain for the benefit of A-7 and A-8, defrauding AEPC. The necessary ingredient here is the meeting of minds between the conspirators.

56. In the case on hand, first of all, the trial court has acquitted A-1 to A-3. Once their involvement in the conspiracy stands nullified by acquitting them, the charge against A-4 to A-8 should also equally fail as without their assistance and help, A-4 to A-8 would not be in a position to gain an undue

advantage. Therefore, the meeting of minds has not only been proved by the prosecution, but has equally been severed by the judgment of the trial court and the prosecution not preferring appeal against the said conviction, now it is not open for the prosecution to blow hot and cold and contend that the conviction and sentence imposed on the appellants should be maintained.

57. On an overall holistic analysis of the materials available on record, this Court is of the considered opinion that the trial court has not appreciated the materials on record in proper perspective and, therefore, the conviction and sentence recorded by the trial court, deserves to be reversed.

58. In the result, the conviction and sentence recorded by the learned Addl. Special Judge, Special Court for CBI Cases, Chennai, in C.C. No.33/1999 is set aside and the appellants are acquitted of all the charges framed against them. Fine amount, if any, paid by the accused/appellants are directed to be refunded. Bail bonds, if any, executed by the appellants shall stand cancelled.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

GLN

To

- 1) The IX Addl. Special Judge
Special Court for CBI Cases
Chennai.
- 2) The Inspector of Police,
CBI/ACB, Chennai.
- 3) The Public Prosecutor
High Court, Madras.

+1cc to Mr.S.Xavier Felix, Advocate, S.R.No.4710
+1cc to M/s.V.Krishna Kumar, Advocate, S.R.No.4008
+1cc to M/s.P.N.Radhakrishnan, Advocate, S.R.No.4545
+1cc to M/s.L.Baskaran, Advocate, S.R.No.4314
+1cc to M/s.K.Srinivasan, Advocate, S.R.No.3992

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RP(CO)
KKV/14/08/2020